Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–456

VERNON D. PATCH, M.D., et al.,
Petitioners,

v.

KEVIN H. WHITE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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No. 77–456

VERNON D. PATCH, M.D., ANTHONY E. RAYNES, M.D., LAWRENCE F. BERLEY, M.D., JOANNE SIMON, JANE S. MURPHY, JOHN DOE, and JAMES COE,

Petitioners

v.

KEVIN H. WHITE, as he is Mayor of the City of Boston and Acting Commissioner of Health and Hospitals,

HERBERT P. GLEASON, as he is Chairman of the Board of Health and Hospitals, and as he is President of Trustees of Health and Hospitals of the City of Boston, Inc.,

LEON WHITE, MARY FIDLER, GEORGE MUNOZ, MICHAEL McCUSKER, DORIS GRAHAM, JOHN VITAGLIANO, and WILLIAM MORRISSEY, as they are or were members of the Board of Health and Hospitals and as they are members of Trustees of Health and Hospitals of the City of Boston, Inc., and

DAVID L. ROSENBLOOM, Acting Executive Director of the Department of Health and Hospitals,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §291

"The purpose of this subchapter is —

(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;

(b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic, preventive, treatment, or rehabilitative services; and

(c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospital, clinic, or similar services, facilities, and resources, and to promote the coordination of such research, experiments, and demonstrations and the useful application of their results."

* * * *

21 C.F.R. §1402.03(f)

"Notice and review of termination of treatment. In any case in which a decision is made that a patient's treatment to which this part applies be terminated or substantially changed by the program director, the patient shall be given written notice of this fact and the right to have such decision reviewed in accordance with procedures established for that purpose."

* * * *

Bylaws of the Medical and Dental Staff of the Boston City Hospital, Article III, §7(b)(2)

"A staff member whose clinical privileges have been summarily suspended shall be entitled to request that the Executive Committee of the Medical and Dental Staff hold a hearing on the matter within such reasonable time period thereafter as the Executive Committee may be convened in accordance with Article III, Section 8, of these Bylaws."

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the First Circuit correctly affirmed the District Court's dismissal of Petitioners' complaint for lack of subject matter jurisdiction and lack of standing?

2. Whether the actions of the Respondents in closing some units of a drug treatment program were lawful?

3. Whether the discharge of the Petitioner Patch violated any protected property right or any properly raised right to free speech?

STATEMENT OF THE CASE

The Respondents endorse and rely upon the statement of the case set forth in the opinion of the Court of Appeals set forth in the appendix to Petitioners' petition (Pet. App. A-2–A-6).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT.

1. The District Court lacked jurisdiction over the subject matter of the complaint.

Federal courts are courts of limited jurisdiction. They are empowered to hear only such cases as are within the judicial power of the United States as defined in the Constitution and entrusted to them by jurisdictional grant of Congress. Facts disclosing the existence of jurisdiction must be affirmatively alleged. *Bingham* v. *Cabot*, 3 Dall. 382 (1798). See also, F.R. Civ. P. 8(a) (1), *Turner* v. *President*, 4 Dall. 8 (1799), *Miclau* v. *Miclau*, 58 F.R.D. 207 (1972).

Petitioners here have failed to allege affirmatively a violation of federal law. Below, Petitioners alleged jurisdiction under 28 U.S.C. §§1331, 1334 as an action arising under the Fourteenth Amendment, the Drug Abuse Education Act

of 1970 (P.L. 91-527), and the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255). However, Petitioners alleged no violations of actual rights guaranteed them by either the Constitution or federal law. At best, they have presented a series of rules and regulations, assurances and guarantees of agreements running between N.I.D.A. and the Trustees concerning federal funding of the Boston Drug Treatment Program but vesting no private right of action in the Petitioners.

There is no constitutionally guaranteed right of a physician to be able to treat patients within the context of a particular program. No community is required to supply him with medical facilities for the treatment of a particular medical condition or disease. In modifying the drug program through eliminating two detoxification wards, a hot line, and a sheltered workshop/work training program, (Pet. App. A-5) the Trustees may have altered the type of tools available to the physicians but have not infringed upon any federally protected rights.

Furthermore, Petitioner patients here have no constitutionally or federally protected right to continued treatment within the confines of the particular programs which existed when they were accepted as patients. They have access to alternative drug programs and all other facilities of the Department of Health and Hospitals. This Court has properly not recognized a general constitutional right to treatment, *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), yet Petitioner patients here assert a constitutional right to treatment within the confines of a particular program. Clearly, no such right exists.

2. Petitioner patients have no standing to allege violations of the terms of the contract between N.I.D.A. and the Trustees.

Petitioner patients lack standing to sue Respondents on the basis of contractual guarantees running between N.I.D.A. and the Trustees. The grant is governed by federal regulations

which are open to interpretation, negotiation and modification by N.I.D.A. on behalf of the Trustees. 45 C.F.R. Part 16. The agreement has, in fact, been modified to the satisfaction of both parties and the program continues on a smaller scale. Only two entities, the parties to the agreement, have standing to enforce it.

Petitioner patients, although within the zone of interests protected by the Drug Abuse Office and Treatment Act of 1972, have not suffered "injury in fact" and thus do not have standing to sue because alternative drug programs and hospital facilities are available to them. See, *Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), *Barlow* v. *Collins*, 397 U.S. 159 (1970).

3. Petitioner Patch and other drug program employees have no standing to bring suit on behalf of themselves or their patients.

As the District Court said, the Petitioner staff members do not have an express right of action under the Drug Abuse Office and Treatment Act of 1972 and they are not within the zone of interest protected by that statute. Although the director signed the agreement at issue, he clearly did so "as an agent of the City, and the flow of mutual obligations runs between him and the United States, not between him and the City." (Pet. App. B-2) Therefore, the staff members have no standing to sue in their own behalf.

Furthermore, Petitioner Patch and the other employees do not have standing on behalf of their patients to bring this action. This Court has held that plaintiffs must generally assert their own legal rights and interests and cannot rest their claims to relief on the legal rights or interests of third parties. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). Even if the staff members were to prevail against this argument, they could not derive standing to sue from their patients for the latter

have no such right. Having suffered no "injury in fact," the patients have no standing to sue in their own behalf and thus may not grant it indirectly to the staff members.

The Petitioners cannot overcome a fatal flaw in their state court complaint, their first complaint in the District Court, and their amended complaint. N.I.D.A. is not a party. "The federal agency has not been made a party to the suit and, through the United States Attorney, has informed the Court that it does not desire to enforce the agreement through legal action." (Pet. App. B-2) The Petitioners cannot stand in the shoes of the other party to the grant contract. Since they cannot, they do not have standing to enforce its provisions.

II. THE PETITIONERS HAVE FAILED TO STATE A CLAIM OF A VIOLATION OF THEIR PROCEDURAL OR OTHER RIGHTS.

1. None of the Petitioners' procedural rights were violated by the lawful closure of some units of the program.

Petitioner patients erroneously claim that the closure of the drug treatment units without prior written notice or administrative review has violated procedural rights guaranteed them by the Drug Abuse Office and Treatment Act of 1972 and federal regulations promulgated thereunder. The regulation states:

> [I]n any case in which a decision is made that a *patient's treatment* . . . (is to) be terminated or substantially changed *by the program director* . . . *the patient* shall be given written notice of this fact and the right to have such decision reviewed in accordance with procedures established for that purpose. 21 C.F.R. § 1402.03(f). (Emphasis supplied.)

The Court of Appeals properly declined to apply this regulation to cases where entire units were being closed.

> [W]e agree with the District Court's conclusion that the regulation does not apply to decisions to close some units in a program. Such decisions are of a legislative nature, involving, as they do, the policy judgment as to whether the benefits to be derived from the continued operation of the units outweighs the costs. (Pet. App. A-8.)

This view of the regulation is supported by both the structure of the regulatory framework and the language used. The Court of Appeals correctly said that nothing in the regulation suggests that it was intended to create a forum to debate issues of policy. The hearings provided for must be narrow in scope, focusing on the particular fact of the patient's situation. The issue to be adjudicated in the hearing is whether a patient's situation has so changed that it is no longer appropriate for him to receive a particular type of treatment.

The language of the regulation also permits no other conclusion. The regulation refers to "a patient's treatment" and further states "the patient" shall be given written notice of termination or substantial change in his treatment and the right of review. By referring to "patient" in the singular, the regulation is clearly aimed at providing notice and hearing to the patient within an ongoing program whose individual treatment is to be substantially changed or terminated. The regulation is thus inapplicable to the termination of an entire program.

Plaintiffs cite *Glover* v. *McMurray*, 361 F. Supp. 236 (S.D.N.Y. 1973), for the proposition that a conflict between the circuits exists with respect to the necessity of providing individual pretermination hearings prior to closing an entire treatment unit. *Glover* is inapposite. There, individual pretermination hearings mandated by 45 C.F.R. §§205, 206 pursuant to the Social Security Act, 42 U.S.C. §602(a)(4) would have established the eligibility of parents to receive day care services and prevented the closing of the particular day care centers involved. Here, termination of parts of the program was based on a necessary centralization of services

and an overall cutback in city spending. Unlike *Glover*, the termination of services in the units involved here was not based on individual eligibility; the units would have closed regardless of any hearings. In any case, adequate alternative drug programs exist and are available to patient Petitioners.

Furthermore, no patient was deprived of his due process rights under the Fourteenth Amendment by Respondents' failure to provide pretermination notice and review. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976), citing *Cafeteria and Restaurant Workers' Local 473* v. *McElroy*, 367 U.S. 886 (1961).

As *Mathews* reveals, prior decisions of this Court indicate that resolution of what procedural protections are constitutionally due in a given situation requires consideration of three separate factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

The Petitioner patients here have no private interests which are adversely affected by the closing of the units because alternative drug programs are available to them. Petitioners cannot successfully allege an interest in treatment at any particular location particularly where, as here, the governmental interest in consolidation is so strong. Similarly, Petitioner patients suffered no risk of erroneous deprivation of any interest in treatment because termination was not based on individual eligibility, status or condition.

2. No substantive violations of patients' rights occurred because they have no private right of action under the contract between N.I.D.A. and the Trustees.

The Court of Appeals correctly sustained the holding of the District Court that patient Petitioners have no private right of action under the Drug Abuse Education Act of 1970. The maxim of statutory interpretation *expressio unius est exclusio alterius* applies here. Congress, in §507, provided for judicial review of any determination made by the Attorney General with respect to control and enforcement of the Act (Part II) and import and export of narcotics (Part III) but did not extend this provision to rehabilitation and treatment aspects of the Act (Part I). Thus, Congress did not intend to grant a private right of action to patients such as Petitioners here.

Petitioners seek to analogize their position to that of plaintiffs in *Euresti* v. *Stenner*, 458 F. 2d 1115 (5th Cir. 1972) and *Cook* v. *Ochsner Foundation Hospital*, 319 F. Supp. 603 (E.D. La. 1970), cases in which patients were found to have a private right of action to compel grantee hospitals to comply with the Hill-Burton Act, 42 U.S.C. §291 *et seq.* It is significant that other courts have refused to imply a private civil action under the Hill-Burton Act. *Stanturf* v. *Sipes*, 224 F. Supp. 883, 899 (W.D. Mo. 1963), aff'd 335 F. 2d 224 (8th Cir. 1964); *Matthews Et Ux* v. *Yale-New Haven Hospital*, 32 Conn. Sup. 539, 543 A. 2d 661 (1974), cert. den. 423 U.S. 1024 (1975). Furthermore, courts which have implied a private civil action under the Act have pointed to the statement of purpose in 42 U.S.C. §291 (a):

> to assist the several States in the carrying out of their programs for the construction and modernization of such public or other . . . hospitals . . . as may be necessary . . . *to furnish adequate hospital, clinic, or similar services to their people.* (Emphasis supplied.)

Thus, these courts have reasoned from the statutory purpose that the beneficiaries under the Act are persons requiring medical treatment.

The Drug Abuse Education Act of 1970 contains no such purpose to furnish any particular program of treatment to drug dependent persons. Section 2(b) of the Act states:

> It is the purpose of this Act to encourage the development of new and improved curricula on the problems of drug abuse; to demonstrate the use of such curricula in model educational programs and to evaluate the effectiveness thereof . . . .

It is clear that Congress intended that governmental entities have great leeway in establishing different kinds of drug programs and modifying or terminating them based on their effectiveness and the costs of their continued operation. The recognition of third-party action based on the Trustees' contract with N.I.D.A. would substantially reduce federal officials' flexibility in administering grants like that involved here. (Pet. App. A-11) Such a result would violate the express purpose of the Act, the continuous development of new and improved programs through an ongoing process of cost-benefit analysis.

While it is true that the United States General Accounting Office (GAO) and the Finance Commission of the City of Boston (FinCom) found administrative deficiencies in the operation of some parts of the program, it is important to note what the FinCom, a Boston fiscal watchdog agency, really said in the first page of its report. Petitioners, in their excerpts of the report on the management of various health funds, omit from their Appendix C the following:

> The Finance Commission has found ample grounds for criticism, but in the interest of avoiding sensationalism it should perhaps be stated at the outset what the Finance Commission did *not* find:

> (1) The Finance Commission found no evidence of theft or conversion to private use of the funds in question;
>
> (2) The Finance Commission found no indication that the officials responsible for the expenditure of the funds in question acted other than in good faith and in an honest attempt to carry out what they understood to be their duty.

All medical services to be provided under the grant were provided.

Each and every person in the program and every person in the City continues to have access to and to receive all medical services offered by the City of Boston. The Petitioners' complaint is that some services which they would like to have are not provided. This proposition is not sufficient to create a violation by the Respondent of any substantive right, nor is it sufficient to warrant the granting of their petition.

III. THE DISCHARGE OF THE PETITIONER PATCH DID NOT VIOLATE ANY OF HIS PROTECTED RIGHTS.

1. The Petitioner Patch did not have a property interest in his position which required procedural due process.

The Petitioner Patch (hereinafter Petitioner) assumed the directorship of the drug program with the permission of the Executive Director. Because neither the Board nor Trustees, Inc. appointed him to that position, he was an employee at will and could, therefore, be terminated at the will of the Executive Director. As an employee at will Petitioner has no federal right to Fourteenth Amendment procedural safeguards unless state or municipal law has created a legitimate claim of entitlement, *Roth* v. *Board of Education*, 408 U.S. 564, 577 (1972).

> It would stretch the concept too far to suggest that a person is deprived of liberty when he simply is not retained in one position but remains as free as before to seek another. This same conclusion applies to the dis-

> charge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for discharge. *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976).

In his petition, Petitioner primarily relies on the bylaws of Boston City Hospital and Statutes 1885, chapter 266, section 5, as amended, to provide him with a claim of entitlement to something more than the termination he received. The Petitioner, of course, must establish that he had a substantive right to continue as director of the program. Both the District Court and the Court of Appeals were correct in concluding that the Petitioner had failed to show that these two provisions, even assuming that they had the force of "state law," provided Petitioner with any such right.

Statutes 1885, chapter 266, section 5, as amended, provides that every subordinate holds office until removed for cause. Section 5 of that chapter, as amended, defines subordinates " . . . only assistants, deputies, clerks and the officers, appointed by an officer or board in charge of a department and paid a yearly salary." The Petitioner is not such a subordinate nor was he appointed in the required manner. This statute does not apply to Petitioner as both courts below perceived.

Even if Petitioner's employment can be said to fit into the ordinance, dismissal for cause only does not automatically entitle an employee to constitutional protection. In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), a non-probationary civil servant was dismissed without a hearing under administrative regulations which provided removal only for cause. The Court held that "the right not to be discharged except for 'cause' did not create an expectancy of job retention in those employees requiring procedural protection under the due process clause beyond that afforded here by the statute and related agency regulations," *id.* at 134. Thus, where Statutes 1885, chapter 266, section 5, as amended, did not provide for any specific

procedures, an employee could be dismissed for cause, without a prior hearing.

Petitioner also looks to the Medical Staff Bylaws of Boston City Hospital (BCH), federal grant provisions, and various federal regulations for a legitimate claim of entitlement to a property interest in his employment. These allegations were not raised in the Petitioner's original complaint and under the doctrine of *Ellis* v. *Dixon*, 349 U.S. 458 (1954) a writ of certiorari may be dismissed or denied when the petitioner fails to allege certain facts in his original pleadings. In any case, both the District Court and First Circuit were correct in dismissing the complaint based upon these allegations.

The BCH Bylaws, Article III §7(b)(2) provide that a staff member is entitled to a hearing whenever circumstances affect his "appointment or status" on the staff. There has never been any change whatsoever in Petitioner's status as a physician at BCH.

As to the federal grant provisions and federal regulations, Petitioner has not bothered to explain these in his petition and the First Circuit was correct in summarily dismissing these claims. (See A-14 of Petitioners' Appendix.)

A writ of certiorari is granted only for "special and important reasons," U.S. Supreme Court Rule 19, *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1954). In *Bishop* v. *Wood*, *supra*, Justice Rhenquist emphatically stated that:

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . in the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutional rights we must presume that official action was regular, and if erroneous, can best be corrected in other ways. The due process clause is not a guarantee against incorrect or ill-advised personnel decisions, *id.* at 349–350.

2. Petitioner's dismissal did not violate his First Amendment rights.

Again, it must be pointed out that Petitioner did not raise this claim in the original complaint. The First Circuit stated:

> it is elementary that an appellant is not normally permitted to have the benefit of a new theory on appeal. While the court in its discretion may relax the rule to prevent a clear miscarriage of justice . . . this case strikes as an inappropriate one to deviate from the normal practice. (Pet. App. A-14).

Petitioner's private criticism of the fiscal and administrative policies of his employers is not within the protections of the First Amendment. The Petitioner's right to constitutional protection is limited by the "balance between the interests of the [public employee] as a citizen commenting upon matters of public concern, and the state as an employer, in promoting the efficiency of the public services through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) at 568. The Court in *Pickering* found a violation of First Amendment rights and clearly based its decision on the public nature of the plaintiff's communications in that case. None of those factors are present here. Petitioner's statements were not *public* speech but *private* communications directed toward his immediate supervisors with whom he was in frequent contact and daily conflict.

In a case, factually similar to the present one, *Roseman* v. *Indiana University of Pennsylvania, at Indiana*, 520 F.2d 1364 (1975), a state university teacher was dismissed after she had registered complaints against the chairman of her department. The Court held that she had no First Amendment protection in view of the essentially *private* nature of her statements in forums not open to the public and concerned with an issue of less public interest. In addition, the Court noted that her speech, like Petitioner's had a disruptive

impact, which was likely to interfere with the harmonious relations necessary to the efficient performance of public service.

Petitioner, after all, is a public employee. He is on the staff of a public hospital and was director of a municipal drug treatment program. But Petitioner's stated concerns about depressing public employees' First Amendment rights are misplaced. There is certainly a difference between valid criticism and speech which produces intolerable disharmony and dissension. Petitioner was not dismissed merely for his alleged refusal to distort program costs but for his lack of cooperation and the inefficiency and chaos he attempted to produce.

Petitioner is not the victim of a "clear miscarriage of justice," *Rolo-Lith Ltd.* v. *F. P. Bartlett and Co.*, 297 F. 2d 497, 500-501 (1st Cir. 1962). Rather he has had his day in the state court of Massachusetts, his day in the United States District Court, and his day in the United States Court of Appeals. Petitioner, contrary to the standards set forth by Sup. Ct. R. 19, seeks to waste the time and resources of this Court by bringing here issues never before the trial court, quarrels with policy decisions of various public officers and boards, and the misfortune of various drug-addicted persons. But the Petitioner cannot piggy-back himself any further than he has in the District Court or the Court of Appeals. This "unhappy tale of the administrative and other problems" (Pet. App. A-1) of Boston's drug treatment program brought this far by a former disgruntled employee, should be ended now.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

Respondents
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